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Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 15

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

BURNUP AND SIMS, INC.,
Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI,

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INDEX.

	Page
JURISDICTION	1
COUNTER-STATEMENT OF QUESTION PRESENTED	2
STATUTE INVOLVED	2
STATEMENT OF FACTS	3
ARGUMENT IN OPPOSITION TO GRANT OF WRIT	4

AUTHORITIES CITED.

Cusano v. N.L.R.B., 190 F.2d 898 (C.A. 3)	6
Local 357, International Brotherhood of Teamsters, Chauffeurs and Warehousemen v. N.L.R.B., 365 U.S. 667, 680	5, 6
N.L.R.B. v. Cambria Clay Products Company, 215 F.2d 48 (C.A. 6)	6
N.L.R.B. v. Erie Resistor Corporation, 373 U.S. 221, 229, fn. 8	5
N.L.R.B. v. Industrial Cotton Mills, 208 F.2d 87 (C.A. 4)	6
N.L.R.B. v. Mackay Radio & Tel. Co., 304 U.S. 333	7

STATUTES.

National Labor Relations Act, as Amended, (61 Stat. 136, 29 U.S.C. 151, et seq.)	2

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BRIEF IN OPPOSITION TO PETITION.

Burnup and Sims, Inc., Respondent herein and below, respectfully files this Brief in opposition to the Petition for Writ of Certiorari filed by the National Labor Relations Board, Petitioner herein and below.

JURISDICTION OF THE PETITION FOR WRIT OF CERTIORARI.

The decision which Petitioner here seeks this Honorable Court to review arose from a petition for enforcement of an order of the National Labor Relations Board

filed by Petitioner with the Court of Appeals for the Fifth Circuit. The opinion of the Circuit Court is reported at 322 F.2d 57, and reproduced as Appendix A to the petition filed herein.

Jurisdiction is invoked pursuant to the provisions of 28 U.S.C. 1254 (1) and Section 10 (e) of the National Labor Relations Act, as amended. This Honorable Court has jurisdiction to review the decision entered herein by the Court of Appeals for the Fifth Circuit. However, we respectfully submit that an exercise of sound judicial discretion will deny review since the decision herein is not in conflict with any decision of this Court, does not decide issues not already decided by this Court and is not in conflict with the decision of any other court of appeals.

COUNTER-STATEMENT OF QUESTION PRESENTED.

Whether an employer, completely free from discriminatory motive, violates the National Labor Relations Act by discharging two employees it believes in good faith threatened to dynamite employer's property in the course of soliciting union membership.

STATUTE INVOLVED.

The question here presented is controlled by the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, et seq.).[1]

[1] "Sec. 8. (a) It shall be an unfair labor practice for an employer—

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization

* * * * *"

STATEMENT OF FACTS.

National Labor Relations Board, Petitioner, contests only the single issue posed by the following facts (Petition, p. 6, fn. 6):

Two employees, Davis and Harmon, while on lay-off status engaged in organizing activities in behalf of Local 172, Airline Supply Technicians, International Brotherhood of Teamsters, Chauffeurs & Warehousemen (R. 34). Contemporaneously with this activity, an employee of Respondent advised a Respondent manager that Davis and Harmon, while spoliciting him to sign a union card at his home had made threats against company property. According to the manager, the employee stated that Davis and Harmon warned that "if they didn't get their jobs back, if the union didn't get in, it would be fixed so no one could work;" by "using dynamite on the silos, the storage silos" (R. 41, J.A. 160, 180-181).

The Circuit Court found that Respondent in good faith believed that the threats alleged to have been made had in fact been made. Petitioner does not here dispute this finding.

Based on this belief, Respondent advised both Davis and Harmon by letter that because they "made or condoned serious threats to damage property of the company, should the union fail to win its election", they were being removed from lay-off status and terminated (R. 71; J.A. 195, 196). Neither Davis nor

Harmon responded to the letter and in fact issued no denial or other comment until they testified in the subsequent unfair labor practice hearing (R. 43; J.A. 32-37; 56-63). Prior to the receipt of the termination letters, Davis admitted having heard from Harmon that a "rumor" was going around among Respondent's employees that he had "made threats against the Company that (he) was using dynamite to blow up the sand silos" (J.A. 38).

The National Labor Relations Board, Petitioner, held that Respondent's termination of Davis and Harmon violated Section 8 (a)(3) and (1) of the Labor Management Relations Act, as amended. The Circuit Court of Appeals refused to enforce this finding and stated (322 F.2d at 62; Appendix A, Petition p. 21):

> "Here there was an honest belief that the employee had engaged in unprotected activity which warranted dismissal. The General Counsel cannot dispose of his burden by showing that the belief was erroneous; he must go further and show that the belief was not bona fide. The test for determining whether a discharge is wrongful under such circumstances as are presented by this case is the motive behind it."

ARGUMENT IN OPPOSITION TO GRANT OF WRIT.

Section 8 (a)(3) of the Labor Management Relations Act provides: "It shall be an unfair labor practice for an employer—by discrimination in regard to hire or tenure of employment or any term or condition of

employment to encourage or discourage membership in any labor organization . . .".

In *Local 357, International Brotherhood of Teamsters, Chauffeurs & Warehousemen v. N.L.R.B.*, 365 U.S. 667, 81 S.Ct. 835, this Court considered the elements necessary to the establishment of a violation of Section 8 (a)(3) of the Act. This Honorable Court stated:

> "It is the 'true purpose' or 'real motive' in hiring or firing that constitutes the test." (365 U.S. at 675.)

This interpretation is emphasized in the concerning opinion of Mr. Justice Harlan which gives "explicit articulation" to "considerations . . . doubtless implicit" in the Court's opinion. The concurring opinion stated:

> "What, in my view, is wrong with the Board's position in these cases is that a mere showing of foreseeable encouragement of union status is not a sufficient basis for a finding of violation of the statute. It has long been recognized that an employer can make reasonable business decisions, unmotivated by an intent to discourage union membership or protected concerted activities although the foreseeable effect of these decisions may be to discourage what the act protects." (365 U.S. at 679.)

Under the facts of the present case, the action taken by Respondent was not directed against protected activity and excused by a claim of "business exigencies". (*Cf. N.L.R.B. v. Erie Reststor Corp.*,

373 U.S. 221, 229, fn. 8.) To the contrary, the action here was directed solely against the alleged threat to dynamite. Petitioner, for the purpose of its Petition, concedes this (Petition, p. 6, fn. 6). Thus, there is in this case no unlawful motive.

Petitioner relies on *N.L.R.B. v. Industrial Cotton Mills*, 208 F.2d, 87 (CA 4), *N.L.R.B. v. Cambria Clay Products Company*, 215 F.2d 48 (CA 6) and *Cusano v. N.L.R.B.*, 190 F.2d 898 (CA 3) as the basis for alleging a conflict between circuit courts and as establishing a *per se* doctrine in the area of a Section 8 (a)(3) violation. That these cases do not stand for the proposition advanced by Petitioner appears from the concurring opinion in *Local 357, International Brotherhood of Teamsters, Chauffeurs & Warehousemen v. N.L.R.B., supra*, 365 U.S. 667, 680. Mr. Justice Harlan, with whom Mr. Justice Stewart joined, concurring, commented that the explanation for the fact that no finding of unlawful motivation was necessary in *Cusano v. N.L.R.B., supra*, and *N.L.R.B. v. Industrial Cotton Mills, supra*, was that there was an "absence of a significant business justification for the employers' acts". The case of *N.L.R.B. v. Cambria Clay Products Company, supra*, merely followed the holding in the *Industrial Cotton Mills* case.

Both the *Cambria Clay Products Company* case and the *Industrial Cotton Mills* case dealt with the obligation to reinstate unfair labor practice strikers who were refused reinstatement because of a mistaken belief that they had engaged in misconduct. The law is clear

that absent special circumstances, the strikers are entitled to their jobs back. (*N.L.R.B. v. Mackay Radio & Tel. Co.*, 304 U.S. 333.) Thus, in both cases, the General Counsel for the Board proved a prima facie case by showing that the strikers were not reinstated. The burden of showing an affirmative defense then devolved upon the respondents. In order to rebut the General Counsel's case, respondents had to affirmatively prove misconduct. Such a burden, we submit, was not upon the Respondent in the present case.

We submit that the decision of the Circuit Court in the present case is in full accord with the decisions of this Honorable Court. We further submit that the cases relied upon by Petitioner to support an allegation of conflict between circuit courts are inappropriate.

It is requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

FISHER & PHILLIPS,

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CERTIFICATE OF SERVICE.

I HEREBY CERTIFY that I mailed five (5) copies of the foregoing Brief In Opposition to Petition for Writ of Certiorari to the Honorable Archibald Cox, Solicitor General, Department of Justice, Washington 25, D.C., by United States first class mail, postage prepaid, this .... day of December, 1963.

JOHN BACHELLER, JR.,
Of Counsel.